

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No 1098 of 1996

For Approval and Signature:

Hon'ble MR.JUSTICE R.R.JAIN

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1. Whether Reporters of Local Papers may be allowed to see the judgements? No

2. To be referred to the Reporter or not? No

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3. Whether Their Lordships wish to see the fair copy of the judgement? No

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? No

5. Whether it is to be circulated to the Civil Judge? No

IQBAL MUHAMMADKHAN

TALEMUHAMMADKHAN LOHANI

Versus

SHANKARBHAI BHEMABHAI PATEL

Appearance:

MR SK JHAVERI for Petitioner

MR MK OZA for Respondent No.1.

CORAM : MR.JUSTICE R.R.JAIN

Date of decision: 20/02/97

ORAL JUDGEMENT

Mr.Jhaveri seeks permission to delete respondent No.2. Permission granted. The name of respondent No.2 stands deleted.

2. Rule. Mr. M.K.Oza waives service of Rule on

behalf of respondent No.1.

3. Respondent No.1 - original plaintiff filed Special Civil Suit No.104 of 1995 in the Court of Civil Judge (S.D.) at Palanpur against the present petitioner for a money decree to the tune of Rs.52 lakhs. The respondent also filed an application under Order 38 Rule 5 of the Code of Civil Procedure (the Code for brief) for attachment before judgment. From the record it appears that initially a notice was issued by that court giving time to the petitioner to furnish security within the stipulated period. It appears that the petitioner did not avail of the opportunity, as a result of which the court passed consequential order of attachment before judgment. The order of attachment before judgment passed ex parte referred to above was carried in appeal to the High Court by preferring Appeal from Order No.75 of 1996. It appears this court did not interfere with the ex parte order.

4. Thereafter, the petitioner - original defendant appears before the trial court with a request to permit him to file objections against the application under Order 38 Rule 5 of the Code and to hear on merits. Since the stage for filing the objections was already over, the petitioner - defendant also gave an application at Exh.49 with a request to permit him to file the objections and hear him afresh. It appears the application at Exh.49 was objected by the respondent. After hearing the learned Advocates, the court below rejected the application vide order dated 15th April 1996. Aggrieved by this order, the petitioner defendant No.2 has filed this revision application.

5. A short question arising for consideration is whether at an interlocutory stage should a party be given an opportunity of hearing or not? In this case, admittedly, a show cause notice was issued to the petitioner for furnishing the security within the stipulated period as contemplated under Order 38 Rule 5 of the Code, but the petitioner failed to respond as a result of which the court was left with no alternative but to pass appropriate consequential order of attachment. But now having come to know about the order, the present petitioner - defendant approaches the court with a request to allow him to file objections and hear on merits.

6. Mr. Oza for the respondent has vehemently argued that by permitting the petitioner, now, to file objections would amount to reviewing the order passed by

this court in Appeal from Order No.75 of 1996 vide which the ex parte order of attachment passed by the court below was not interfered. In my view, in the present judicial system of adversary court is bound to hear both the parties on merits. A party has a right to be heard, otherwise, the aggrieved party would be left with no alternative than to be condemned behind his back. The date on which first ex parte order was passed by Trial Court and Appeal from Order No.75 of 1996 was heard by this court, both courts did not have opportunity of examining case on merits. Now as the contesting party desires to file reply calling upon court to decide the matter on merits, it shall not be open for the plaintiff - respondent to oppose saying that would amount to reviewing ex parte order. Law permits the courts to revoke, alter or modify its ex parte orders after ex parte hearing.

7. It is true that, at the initial stage, the petitioner was a little negligent and did not avail of the opportunity to file objections within the stipulated period. But that does not mean that his right to oppose on merits is taken away forever. It is always open for the court to accept such objections and allow the party to contest the litigation on merits, of course, having regard to the facts and circumstances of the individual case. Merely because a party approaches the court, after the ex parte order is confirmed, with a request to permit him to file his objections and consider on merits does not mean that the court is called upon to review the order contemplated under Order 47 of CPC. Even after hearing both the parties on merits, the court may or may not confirm, alter or modify the ex parte order but the principles of natural justice do require the courts to hear both the parties. Under these circumstances, in my view, the court below has committed error in not permitting the petitioner to file his reply against the application under Order 38 Rule 5 of the Code. In the facts of this case the order being erroneous and illegal is required to be quashed and set aside.

7. In the result, this application is allowed. The impugned order is quashed and set aside. The reply filed by the petitioner against the respondent's application under Order 38 Rule 5 of the Code is to be taken on record. The court below shall consider the same on merits and pass appropriate order after hearing both the parties. Rule is accordingly made absolute with no order as to costs.

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